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Manhood Deprived and (Re)constructed during Conflicts and International Prosecutions: The Curious Case of the *Prosecutor v. Uhuru Muigai Kenyatta et al.*

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Abstract Recent case law on sexual violence crimes heard before the ad hoc international criminal tribunals and courts, that interpret them in connection with ethnic conflict, raises the question of which acts can be defined as sexual violence. The International Criminal Court (ICC), in the situation of Kenya, does not regard acts of forced nudity, forcible circumcision and penile amputation as sexual violence when they are motivated by ethnic prejudice and intended to demonstrate the cultural superiority of one tribe over another. The Court argues that not every act of violence that targets parts of the body commonly associated with sexuality should be considered an act of sexual violence. This recent interpretation of what counts as sexual violence provides another example of the complicity of international criminal law institutions in the ongoing construction process of female subordination. The ICC, in the Kenya situation, implicitly confirms the mutilation of female agency by interpreting penile amputation as a kind of power game between males, and by instrumentalizing the male sexual organ as an indicator of masculinity and manhood.

Keywords Sexual violence · International Criminal Court · Intersectionality · Kenya case · Masculinity

Introduction

Similar to the gendered aspect of regulatory ideals or norms that penetrate into the acts and bodies of women and men with a heterosexual imperative (Butler 1993, 1997) is the gendered aspect of the notion of the "sexual" in sexual violence crimes

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(Campbell 2007, 417). By considering how the law, which is predominantly male-oriented, silences feminist discourses in favour of masculine voices (Collier 1995, 1998; Irigaray 1985, 2013; Smart 1989, 2013), this article questions how far the International Criminal Court (ICC or "the Court") has moved from such masculinist discourse in its jurisprudence regarding sexual violence crimes in the particular case of the *Prosecutor v. Uhuru Muigai Kenyatta* et al.[1]

This study attempts to engage with the puzzle of how the Court evaluates sexual violence crimes other than rape as crimes against humanity in the Kenyan context. The ICC, in its decision to confirm the charges against three suspects in the Kenya situation, takes a noteworthy step by concluding that forced nudity, forcible circumcision, and penile amputation do not correspond to sexual violence given the specific circumstances of the events.[2] The ICC is of the view that "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence."[3] More specifically, "[t]he acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other," so they do not qualify as other forms of sexual violence within the meaning of Article 7 (1) (g) of the Rome Statute.[4]

Despite the common perspective that the particularity of the sexual violence crimes lies in their power dimension, manifested explicitly or implicitly regardless of the victims' sex (Sivakumaran 2007, 267–270), there is a significant difference in how the effects of such violence on male and female victims are interpreted. It is striking that common discourse surrounding male victims of sexual violence concerns damage to masculinity or loss of manhood (Christian et al. 2011, 235–236; Groth and Birnbaum 1979, 2; Sivakumaran 2007, 270–273), while female victims are not thought to have lost their femininity. The emphasis on masculinity and manhood is also made public in UN documents:

> Men and adolescent boys are also subject to gender-based and sexual torture. The sexual abuse, torture and mutilation of male detainees or prisoners is often carried out to attack and destroy their sense of masculinity or manhood. […]

[1] Kenya, a state party to the Rome Statute since 2005, is one of the eight situations the ICC is currently investigating with three ongoing trials. The case against Uhuru Muigai Kenyatta, President of the Republic of Kenya, has caused significant tension between the ICC and the African Union (AU) due to its being the first trial of a sitting Head of State before the Court. Kenyatta was allegedly criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of murder (article 7(l)(a)), deportation or forcible transfer (article 7(l)(d)), rape (article 7(l)(g)), persecution (articles 7(l)(h)), and other inhumane acts (article 7(l)(k)). Amidst controversial statements from the AU leaders, the ICC Trial Chamber V(b) initially vacated the trial commencement date on 19 September 2014, and then on 3 December 2014 rejected the Prosecution's request for further adjournment. Finally, on 5 December 2014, the Prosecution filed a notice to withdraw charges against Kenyatta. Despite the tension that has arisen out of the trial of the Kenyan President Kenyatta who would be the first sitting Head of State to face charges of crimes against humanity before the ICC were it not for its withdrawal decision, the judicial decisions regarding the situation in Kenya as well as other situations contribute to the development of case law in international criminal law.

[2] Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, 23 January 2012, International Criminal Court, ICC-01/09-02/11 [hereinafter Decision 23 January 2012].

[3] Decision 23 January 2012, para. 265.

[4] Decision 23 January 2012, para. 266.

> These forms of humiliation and violence take on powerful political and symbolic meanings.[5]

In this respect, it is hard to argue that the main problem regarding international criminal prosecutions on sexual violence against men is "the exclusion of civilian males as subjects of protection or as victims" (Carpenter 2006, 85). Rather, the key problem concerns the understanding of when and how sexual violence against men is subjected to prosecution. The decision of the ICC to dismiss sexual assault claims against male victims who were subject to forced nudity, forcible circumcision, and penile amputation evokes further questioning as to whether the Court's approach represents a deviation from the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) with regards to the prosecution of sexual violence crimes.

Rather than isolating rape and other forms of sexual assault from elements of ethnic prejudice or any other representations of inter-group conflicts, the ICTY, ICTR, and SCSL interpret such crimes in connection with, *inter alia*, the ethnic motivations of the defendants. The ICC's interpretation in the Kenya situation might be either due to its taking ethnic motivations and superiority claims as disconnected from sexual violence, or its search for an additional element other than targeting the victim's sexual organs or sexual integrity with ethnic prejudices. These differences notwithstanding, the common denominator in the approaches of various criminal systems to rape and sexual assault is the ultimate aim of preventing and punishing violations against sexual autonomy.[6] The ICC's approach triggers the question of why it concluded that there had not been a violation against the sexual autonomy of males in this case, and how forced nudity, penile amputation and forced circumcision are interpreted as acts *not* of a *sexual nature*.

In order to resolve this puzzle, the first section commences with a summary of the incorporation of norms prohibiting and sanctioning sexual violence in international humanitarian law and international criminal law before elaborating more extensively on sexual assault trials and intersectionality. The main objective of this section is to show that the ICC does not substantially differ from the preceding case law in failing to develop a critical perspective towards gendered categories or stereotypes with a simultaneous acknowledgment and (re)construction of masculine narratives of sexual violence. The second section scrutinizes the ICC's Kenya Decision, and particularly explores the interplay between sexuality and ethnicity while underlining that different roles are ascribed to male and female members of the "enemy" group. The third section begins to articulate what might be the meaning of the (in)visibility of sexual harm with respect to male power and

[5] Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000), para. 59, available at http://www.un.org/womenwatch/daw/public/eWPS.pdf. See also UN Security Council Resolution No. 1325 (S/RES/1325) (31 October 2000), and UN Security Council Resolution, Women and Peace and Security, (U.N. Doc. S/RES/1820) (19 June 2008).

[6] *Prosecutor v. Kunarac et al.*, 22 February 2001, International Criminal Tribunal for the Former Yugoslavia, IT-96-23-T & IT-96-23/1-T, para. 457 [*hereinafter Prosecutor v. Kunarac et al.*].

dominance, and continues by exploring its distinct impact on societies that are experiencing a transitional justice process.

The primary aim of this article is to demonstrate that the ICC, by attributing a particular understanding of sexual nature disengaged from ethnic superiority claims, confirms the patriarchal discourse that denies much of women's sexual and political agency. The Kenya decision shows that ethnic superiority claims and sexual violence are not mutually exclusive, but that the particular way the sexual nature element is interpreted determines whether sexual violence has been committed or not. In this interpretation, the loss or mutilation of sexual organs are taken as a deprivation of manhood which precipitates the loss of power in sexual intercourse, yet this loss is not accepted as constituting sexual assault until the performative or sexual intercourse stage. Thus, sexual assault is not deemed to have taken place when there is no performance in this sense, albeit the mutilation of sexual organs represents actual or symbolic deprivation of male power.

Instrumentalizing the male sexual organ as such, the ICC introduces a legal discourse regarding sexual violence acts that is very much the same as earlier international criminal tribunals, notwithstanding the initial impression that both the Rome Statute and recent case law represent significant improvement in comparison with its predecessors. Due to this reason, a further aim of this article is to undermine potential relief after the Rome Statute on account of the putative progressiveness of the ICC. The ICC case law, rather than contradicting the case law of the *ad hoc* tribunals and courts, corresponds with precedent law, which continuously (re)constructs and (re)produces acts of sexual violence as a game played mainly by men where women hold the role of passive recipients of male dominance.

It is not the lack of consideration of harm and violence against women in legal spheres, but rather the way such harm and violence are understood and interpreted that present a real problem from a feminist legal theory perspective, as "the conceptual and practical outworkings of such consideration affirm [women's] secondary and disjunctive social status" (Ni Aolain 2009, 221). The ICC, by ignoring the sexual and gendered harm to male victims in the Kenya case, delineates women as the only victims in a covert manner and thus reinforces a masculine manifestation of sexual violence. In this manner, women are once again victimized and subordinated in a legal system with patriarchal components.

The conceptualization of male sexual violence in international criminal law is intertwined with the conceptualization of female sexual violence, both of which seem to this author to be to the detriment of multiple voices. Thus, this article is not an attempt to propose that male sexual violence should be conceptualized in similar ways as female sexual violence. Instead, this article encourages legal scholars, lawmakers, and activists to reinitiate a critical engagement with the implications of the way sexual violence is framed and interpreted by law and how such implications have profound resonance for women even when the direct victims of the acts are men. The ICC interpretation in the Kenya case should be scrutinized and actively confronted in order to prevent international criminal law on sexual violence from evolving towards a hazardous point where the masculinity of violence is perpetuated in the theatre of the courtroom as well as the theatre of war. While welcoming the endeavour of international criminal tribunals and courts to prosecute sexual violence

crimes, this article contends that feminist criminal law scholarship should take a critical position in the discursive fray not only during conflicts, but also transitional justice processes including but not limited to prosecutions on sexual violence crimes (Ni Aolain 2012). The conclusion posits the view that keeping a vigilant feminist outlook towards international prosecutions has the real potential to reverse the harmful (re)construction and (re)production process of patriarchal gender relations in court rooms. Accordingly, the ICC's Kenya narrative must be resisted in order to prevent the closure of discourse on sexual violence crimes so that "its hold on the interpretation of reality can be broken" (Davies 1994, 370).

Sexual Violence in International Criminal Law

The internationalization of sexual violence crimes as a recent development has been subject to two almost concurrent transmissions: one from the honour discourse[7] to the criminal law discourse, and the other from the side-effect discourse to the weapon discourse.[8] The honour discourse has to a certain extent been overcome through the jurisprudence of the ICTR, ICTY, SCSL, and finally the ICC with the codification and prosecution of sexual and gender violence under the categories of war crimes, crimes against humanity, and genocide. Both of these transitions are generally interpreted positively (Askin 2003; Bedont and Hall-Martinez 1999; Boon 2001; Hagay-Frey 2011). However feminist scholarship warns against the danger of depicting women as subdued, passive, and powerless individuals lacking political agency both during (Aradau 2008; Baaz and Stern 2013; Penttinen 2007) and in the aftermath of conflict when sexual violence crimes become subject to prosecutions (Copelon 2000).

Notwithstanding the successes in terms of ending impunity, international prosecutions' precarious tendency to attribute victimhood to women and reinforce stereotypes of women's vulnerability and need for protection generates a difficult dilemma. The problem is that feminist jurisprudence needs to resolve whether the legal process should acknowledge the social and cultural perspectives and practices, or reflect the actuality of practices that might end up with a failure to account for the specific and lived experiences of the victim (Ni Aolain 2000, 61–62). In other words, should the complex and specific experiences of the victims of sexual violence be dismissed for an ideal type unencumbered by social context which relates also to an aim of creating totalizing theories of harm?

[7] Article 46 of the 1907 Hague Convention (IV), Article 27 of the Fourth Geneva Convention (1949), and Article 76(1) of Protocol Additional to the Geneva Conventions of 1977 (Protocol I) are the primary international law instruments connecting the attack to the "honour" of the victims of rape and sexual assault.

[8] While the side-effect discourse regards rape and other forms of sexual violence as a permanent and inevitable part of warfare, therefore unpunishable (Balthazar 2006, 44), the growing tendency with regards to sex crimes when committed during international or internal armed conflicts is to conceive of them as a strategic weapon designed to defeat and even to annihilate the enemy (Leatherman 2011; Rittner and Roth 2012; Stiglmayer 1994).

If justice is the recognition of harm (Franke 2006, 820), international criminal courts and tribunals should underline the fact that there is more than one definition of harm, and that there is a wide spectrum of harms experienced by a great number of people. Taking into consideration the relationality of harms as products of a social context that includes gender, ethnicity, and/or religion, as well as rejecting the conflation of gender with sexual violence (Grewal 2015, 161–163) "enables analysis of the masculinity of conflicts" (Ni Aolain and Rooney 2007, 340). Within this framework, it becomes equally significant to unfold not only how far international criminal law has moved in its treatment of the intersecting identities in sexual violence crimes, but also what might be lost as a result of developing a single narrative on violence.

Sexual Assault Trials and Intersectionality

Central to intersectionality theory is the purpose of transcending the monocular vision to have access to the impact of social forces and dynamics (MacKinnon 2013, 1020), and addressing "the combined effects of practices which discriminate on the basis of race, and on the basis of sex" (Crenshaw 1989, 149). Yet, intersectionality would fail to effectuate the underlying intention of undermining the hierarchies of power if the term is conceived of merely with reference to a field of study of the object or an analytical strategy while ruling out its critical dimension (Collins 2015). Articulation of intersectionality as "critical praxis" is meant to "seek knowledge projects [which] would critique social injustices that characterize complex social inequalities, imagine alternatives, and/or propose viable action strategies for change" (Collins 2015, 17). Nevertheless, international prosecutions on sexual violence have proved to be falling short of presenting such a critical stance so far. For MacKinnon (2013, 1023), the failure during international prosecutions to open up a critical interrogation of the connection between race, gender and other categories is due to the tendency to take these categories as the reason or dynamic creating the inequality rather than the outcomes.

Despite the fact that "violence against women, and gender inequality, is made visible and treated seriously" during the prosecutions, what we have is a partial visibility (Buss 2007, 13). Indeed, the over-determination of ethnicity, which Buss (2008) considers to be a major constraint in comprehending the complexity of sexual violence, has been the common feature of international prosecutions, and identifying the ethnic character of the conflict between parties played a facilitative role for the prosecutors to prove the coercive circumstances under which sexual assaults occured. It is widely acknowledged that rape was used as a war instrument during the Yugoslavian and Rwandan conflicts in order to "punish the victims and/or to intimidate them or their communities."[9] Rapes and sexual assaults had an ethnic character, rather than serving to improve soldiers' fighting spirit or providing them with sexual comfort.[10] The discourse accompanying rapes also implied an

[9] *Prosecutor v. Celebici*, 16 November 1998, International Criminal Tribunal for the Former Yugoslavia, IT-96-21-T, para. 448 [*hereinafter Prosecutor v. Celebici*]. See also *Prosecutor v. Kunarac et al*., para. 311.

[10] *Prosecutor v. Kunarac et al*., paras. 43, 583, 592.

ultimate goal of affecting the biological characteristics of the targeted group as an intrinsic component.[11] Likewise, the ICTR underlined that "[s]exual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself."[12] The destruction plan intrinsically implied antagonism against another ethnic group as expressed through derogatory discourses such as those seen in the case of Musema, who declared that "[t]he pride of the Tutsis will end today" during the rape of a victim.[13]

In none of these decisions was there a critical interrogation of whether ethnicity or patriarchy was produced through rather than just leading to the atrocities (Buss 2008, 115). "Patriarchy becomes an analytical shortcut for assessing the constitution of community" when a substantial part of the Bosnian Muslim male population in Srebrenica was destroyed (Buss 2007, 21). Likewise, the SSCL is heralded for its conceptualization of the crime of forced marriage, and establishment of the intertwined relationship between sexual slavery and forced marriage[14] despite "the naturalisation and legitimation of (patriarchal) family and marriage structures when contrasted with the aberrant practice of forced marriage in war" (Grewal 2015, 153).

Apparently, an intersectionality method with no critical dimension is prone to (re)produce the categories or stereotypes reflecting hierarchical power relations, while the transformative power [of law] is lost (MacKinnon 2013, 1023, 1024). Failing to consider that social realities are not "static abstract classifications" but rather in constant flux representing "moving substantive realities" (MacKinnon 2013, 1023), sexual assault trials have the unintended danger of introducing yet another totalizing narrative. International criminal law and courts "create a symbolic space within which competing narratives of crimes, perpetrators and victims are produced, circulated and contested, and intimately related to the narratives of justice, responsibility and guilt" (Zarkov and Glasius 2014, v). Emphasizing one amongst a myriad of competing and contrasting narratives implies that international criminal law introduces its own "truth" dependent on a single ontology. The trials, in narrating a single truth, not only determine what took place during the conflicts, but also suppress alternative and subordinated voices by victimizing a whole gender group. Thus, this single ontology of the past and present constructs a parallel future by not hearing the dissident voices of men and women

[11] *Prosecutor v. Celebici*, para. 928; *Prosecutor v. Kunarac et al*., paras. 322, 342; *Prosecutor v. Lukic & Lukic*, 20 July 2009, International Criminal Tribunal for the Former Yugoslavia, IT-98-32/1-T, para. 695; *Prosecutor v. Brdanin*, 1 September 2004, International Criminal Tribunal for the Former Yugoslavia, IT-99-36-T, para. 1011 [hereinafter *Prosecutor v. Brdanin*].

[12] *Prosecutor v. Jean Paul Akayesu*, 2 September 1998, International Criminal Tribunal for Rwanda, ICTR–96-4-T, para. 732 [hereinafter *Prosecutor v. Akayesu*].

[13] *Prosecutor v. Musema*, 27 January 2000, International Criminal Tribunal for Rwanda, ICTR-96-13-A, para. 933.

[14] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, 2 March 2009, Special Court for Sierra Leone, SCSL-04-15-T, paras. 1291–1297, 1459–1473, 1581–1582. The SCSL takes an even further step by replacing the term "forced marriage" with "conjugal slavery" in the Taylor case (*Prosecutor v. Taylor*, 18 May 2012, Special Court for Sierra Leone, SCSL-03-01-T, paras. 428–30.) The SSCL, on the other hand, is criticised for silencing women by excluding evidence of sexual violence during the Civil Defence Forces (CDF) case. See Kelsall and Stepakoff (2007), and Oosterveld (2009).

who have been fighting against patriarchal discourses both before and in the aftermath of the conflicts. A serious complication of a discourse on sexual violence crimes (re)presenting limited and reductive accounts of identities (Buss 2007, 19) seems to be that its use now extends to the prosecutions before the ICC.

The ICC's Intersectionality Approach

The ICC, though still in its infancy in terms of its jurisprudence with regards to sexual violence crimes, seems to follow a very similar pattern to its predecessors, both in terms of the written rules and at the prosecutorial stage. Article 7 (1) (g) of the Rome Statute considers "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" to be acts constituting crimes against humanity.[15] Besides providing flexible grounds for sexual violence crimes, Article 7 (1) (g) is sex-neutral in how it defines sexual violence. The Elements of Crimes of the Rome Statute provides further clarifications on what falls within the meaning of Article 7 (1) (g) constituting crimes against humanity of sexual violence:

> The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.[16]

Though it is not explicitly explained in the Rome Statute and Elements of the Crimes what is implied by the notion of "sexual nature", the ICC, while discussing the elements of the crime against humanity of sexual slavery, hints at the meaning of sexual nature as "matters relating to […] sexual activity."[17] This recent definition reflects a more comprehensive understanding of sexual violence in comparison with the former approach on male victims, which used to be confined to anal rape (Van Tienhoven 1993, 133). Limiting sexual violence against men to anal rape has been both a reason for and outcome of under-reporting and ignoring male sexual violence, as other forms of sexual violence do not always produce physically observable consequences even when the assault is directed to the genitals (Carlson 2006, 21).

In more cases than not, the ICC acknowledges the intersection of sexual violence with ethnicity. For instance, authorizing the Prosecutor to conduct an investigation

[15] Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 3.

[16] Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

[17] Decision on the Confirmation of Charges, Situation in the Democratic Republic the Congo in the Case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 30 September 2008, International Criminal Court, ICC-01/04-01/07, para. 432 [hereinafter Decision 30 September 2008].

into the situation in Kenya, the ICC argues that such acts of violence have an ethnic dimension and target specific ethnic groups:

> While the supporting material corroborates that some of the rapes and sexual violence may be qualified as opportunistic acts facilitated by the general climate of civil unrest and lawlessness, there are however instances of sexual violence encompassing an ethnic dimension and targeting specific ethnic groups.[18]

In the situation of Cote d'Ivoire, the ICC conforms to the prevalent perspective that the targeted civilian victims should be perceived by the perpetrator(s) as belonging to a different type of group, which is most commonly an ethnic group. Pre-Trial Chamber III, in its Cote d'Ivoire decision, states "the available information substantiates the Prosecutor's submission"[19] that victims of rape belonged to a different group and were targeted because of their ethnicity and political affiliation:

> [D]uring the period of post-election violence, pro-Gbagbo forces were responsible for acts of rape against individuals who were active and public members of Alassane Ouattara's political party or who, on account of their ethnicity, were considered to be pro-Ouattara (*e.g.* those who spoke Dioula or Mossi, or who came from Mali).[20]

In a more recent decision on the "Situation in the Democratic Republic of the Congo," the Pre-Trial Chamber II concludes that the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC) adopted an organizational policy including rape (counts 4 and 5) and sexual slavery (counts 7 and 8) to attack part of the civilian population belonging to ethnic groups other than the Hema (the "non-Hema").[21]

Nevertheless, the Court does not demonstrate a straightforward and consistent stance with regards to intersectionality, including but not limited to sexual violence crimes. Despite Bemba being the first person to be apprehended on an ICC arrest warrant for charges of rape,[22] the Pre-Trial Chamber declined to confirm the charges of torture and outrages upon personal dignity and decided to subsume the latter two under the charge of rape.[23] Green (2011) argues that, by denying cumulative

[18] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, International Criminal Court, ICC-01/09-19, para. 155 [hereinafter Decision 31 March 2010].

[19] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire, 3 October 2011, International Criminal Court, ICC-02/11-14, para. 72 [hereinafter Decision 3 October 2011].

[20] Decision 3 October 2011, para. 69.

[21] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, International Criminal Court, ICC-01/04-02/06, para. 36.

[22] Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo (Prosecutor v. Jean-Pierre Bemba Gombo), 10 June 2008, International Criminal Court, ICC-01/05-01/08, para. 1 [hereinafter Bemba Warrant Decision].

[23] Decision Pursuant to Article 61(7)(1) and (b) of the Rome Statute on the Charges against jean-Pierre Bemba Gombo (Prosecutor v. Jean-Pierre Bemba Gombo),15 June 2009, International Criminal Court, ICC/01/05-01/08-424, paras. 204, 310 [Bemba Charging Decision].

charges and conflating the crimes of rape, torture, and outrages upon personal dignity, the ICC fails to adequately recognize the spectrum of harms inflicted by sexual and gender-based crimes. Despite the fact that "sexual violence seemed to be a central feature of the conflict"[24] in the Central African Republic (CAR), the failure to lay cumulative charges in the Bemba case has undermined the attempt to grasp the intersectionality of sexual and gender violence, which is a failure accompanied by a "lack of understanding of [such] violence at the policy level."[25] Though it is noteworthy that the Court included the rape of men,[26] its inability to see that both sexual and gendered harms are produced through the intersection of ethnicity, sex, gender, and religion in the Bemba case becomes even more problematic in the Kenyatta case. Here, the discourse of the ICC intersects with the formation and reformation of collective discourses on sexual violence crimes which reflect a masculinist perspective.

The ICC and the Kenya Case

In connection with the eruption of post-election violence in Kenya which took place between 1 June 2005 and 26 November 2009, the ICC alleges that crimes falling under its jurisdiction have been committed between rival groups as well as by the government forces with an effort to suppress the conflict.[27] The first wave of violence was initiated by groups associated with the Orange Democratic Movement (ODM) directed against supporters of the Party of National Unity (PNU). The members of the targeted groups then organized retaliatory attacks against those deemed responsible for the initial attacks. While the attackers targeted their victims on the grounds of membership in the ODM or the PNU, the acts of violence also had an ethnic character mainly due to the putative convergence of political affiliation with ethnicity.

The post-election violence in Kenya was overwhelmingly characterized by ethnic disputes where the boundaries between ethnic groups overlap with political affiliations. The victims of the first wave of violence were mainly from the non-Kalenjin community and in particular people of Kikuyu, Kisii and Luhya ethnicity, who were perceived as being affiliated with the PNU. In return, counter attacks were directed mainly against non-Kikuyu communities, including in particular people of Kalenjin, Luo, and Luhya ethnicity, who were considered by the Mungiki attackers to be affiliated with the ODM. Despite the overlap between ethnic rivalries and political affiliations, the ICC emphasizes the ethnic dimension rather than the political divisions. Statements about "a Luo victim from Nakuru who was gang

[24] Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court, 25 February 2010, 2d ed., Women's Initiatives for Gender Justice, p. 30, http://iccwomen.org/publications/articles/docs/MaS2_10-10_web.pdf, [hereinafter Making a Statement].

[25] Making a Statement, p. 30. On the other hand, writers such as Bedont and Hall-Martinez (1999, 70); Buss (2007); Charlesworth (1999, 387), and Hagay-Frey (2011) have criticized the ICC for its association of sexual violence with the ethnic dimensions of the conflicts.

[26] Bemba Charging Decision, para. 159.

[27] Decision 31 March 2010.

raped in January 2008 [whose assailants] were of Kikuyu ethnicity"[28] or a woman "having been raped in Naivasha by five men who spoke Kikuyu"[29] support the argument that the conflict takes place between the Kikuyu, organized under the Mungiki organization, and non-Kikuyu groups, who are mainly of Luo and Kalenjin origins. Forced nudity and forced circumcision occurred when "the Mungiki attackers forced [Luo men in Naivasha] to remove their underwear to confirm their ethnicity and forcibly circumcised [them] if they were identified as Luo."[30] Yet, after referring to the Prosecutor's statement that "these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity,"[31] the Court concludes that:

> [N]ot every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence. […][T]he evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.[32]

In brief, the rationale of the ICC's decision to not consider forced circumcision and penile mutilation as sexual violence is due to, first, the lack of the sexual nature element, and second, the main motive being ethnic prejudice and superiority claims. With this interpretation, Pre-Trial Chamber II seems to deviate not only from its previous Decision of 31 March 2010, but also from the general approach in international criminal law that links sexual stereotypes to ethnic identities. The intriguing part of the ICC decision is not merely that forced nudity, forcible circumcision, and penile amputation are not taken as humiliating and degrading in a sexual manner, or that sexuality is detached from ethnicity. The ICC interprets the interplay between sexuality and ethnicity in different ways with regards to male and female members of the group while making certain acts directed at male sexuality invisible. As the "invisibility of sexual assault against men is related to the role of the male body in the production of ethnicity, and with notions of masculinity and norms of heterosexuality therein" (Zarkov 2007, 156), the ICC, rather than overtly contradicting with the previous *ad hoc* tribunals discourse, reflects a covert patriarchal discourse which regards acts of mutilation of male sexual organs as damaging the male power.

Raping or otherwise sexually abusing female members of an ethnic group is regarded as sexual violence for both the female victims and male members of the group, because it is *their* women being subject to sexual violence. Sexual violence against women represents acts of mutilation of the dominance of the male members

[28] Decision 23 January 2012, para. 258.

[29] Decision 23 January 2012, para. 259.

[30] Decision 23 January 2012, paras. 260–261.

[31] Decision 23 January 2012, para. 264.

[32] Decision 23 January 2012, paras. 265–266.

of that group as they fail to protect and stop violence against *their* women. On the other hand, males' act of mutilating other males through depriving the latter of power by penile amputation is a representation of a different type of mutilation of male dominance. Penile amputation and mutilation correspond to the deprivation of male power within a community in the same manner as dispossessing weapons or any other means of power practices. While it is a matter of consent for female victims, sexual violence against men becomes an issue of possessing or dispossessing the means of power to control and dominate such consent. In this context, the ICC not only interprets the mutilation of male sexual organs as yet another "way of communication between male combatants" (Ni Aolain 2009, 224), but also perpetuates a particular political context that makes some victims visible while others are invisible. As noted by Zarkov (2007, 163) "the Other of masculinity is not only the feminine and homosexual Other, but also the racialized, colonized, ethicized Other; and […] it is the body of the male Other that becomes the site of violence."

The Kenyatta Case: A Deviation or Rather a Continuation in International Criminal Law?

Sexual assault is defined as comprising "all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity."[33] However, this definition does not reveal the patriarchal discourse (re)produced by international prosecutions, which implies that the violence done to male and female victims carry different meanings. Sex is taken as something that "normally […] men do to women" (MacKinnon 1983, 650) which, taken as such, becomes abnormal when a woman's consent to a man to perform his dominance becomes dubious and when a man loses his dominant role in any sexual intercourse. It becomes a consent issue for female victims, but a dominance problem when the victims are male.

Thus, forcing Mehmedalija Sarajlic, an elderly Bosnian Muslim, to rape another Bosnian Muslim female detainee in Omarska camp was considered sexual assault regardless of whether or not the rape took place.[34] What Mehmedalija Sarajlic lost in this incident was not his consent, but his male power to "decide" on his own to perform sex. Intentionally forcing, at gunpoint, two Muslim brothers detained at

[33] *Prosecutor v. Furundzija*, 10 December 1998, IT-95-17/1-T, para. 186 [hereinafter *Prosecutor v. Furundzija*]; *Prosecutor v. Stakic*, 31 July 2003, International Criminal Tribunal for the Former Yugoslavia, IT-97-24-T, para. 757.

[34] *Prosecutor v. Brdanin*, paras. 516, 1013. The Furundzija Trial Chamber finds that being forced to watch serious sexual attacks inflicted on a female acquaintance is torture for the forced observer (*Prosecutor v. Furundzija*, para. 267). The Brdanin Trial Chamber confirms this approach when it states that threatening the male members of these groups that "their mothers and sisters would be raped in front of them" is part of the ill-treatment, which signifies the constant humiliation and degradation as an element of torture (*Prosecutor v. Brdanin*, para. 1018). In *Prosecutor v. Kvocka et al.*, the Trial Chamber stresses, *inter alia*, that "[t]he presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped" (*Prosecutor v. Kvocka et al.*, 2 November 2001, International Criminal Tribunal for the Former Yugoslavia, IT-98-30/1-T, para. 149).

Luka Camp to perform fellatio on each other in the presence of others,[35] forcing two male detainees to perform fellatio on each other in the police station in Bosanski Samac,[36] and forcing male detainees to engage in degrading sexual acts with each other in the presence of other detainees in Batković,[37] and in Omarska camps[38] are interpreted as sexual assault in a very similar way to cases when men were "obliged to 'make love' with a hole" (Dolan 2010, 20) or with numerous women (including mothers and sisters) in the Eastern Democratic Republic of Congo (DRC). While women are deemed to lose their consent when they are raped or sexually assaulted, they are attributed passive roles unlike the male victims of sexual violence who lose their active agency through feminization, homosexualization or emasculation (Sivakumaran 2007, 268–273).

Forcing detainees to perform sex acts with each other does not produce the same meaning for males or females. International criminal law speaks of sexual assault for male victims when they are coerced, threatened, forced or intimidated into performing sex on another in the absence not of their *consent* but of their *dominance*. International tribunals accept cases of sexual violence against men when men are disempowered vis-a-vis their sex-partner, which means that men are feminized as they are put into a passive position where their male decision-making capacity to initiate and perform sex is taken away from them.

The ethnic identity of the sexual violence victims, instead of causing complications, provides a supporting element, though ethnicity in the Kenya case is interpreted as a nullifying element rather than a supporting one. This approach supports the lack of female agency when it comes to rape and sexual violence crimes and confirms the view that female members of an ethnic group are the property of the group, while male members are the real and active representatives of the group identity. Penile amputation is the removal of a sexual organ that represents man's capacity to perform dominance in society. The Kenya decision confirms that penile amputation is violence done to manhood. But, rather than a form of sexual violence, it is taken as a power game over the means associated with manhood. In this respect, because the elements of forced sexual performance are absent, penile amputation or mutilation is understood as deprivation of the means to perform dominance in a male-dominant world. Thus, penile amputation is another example of taking *the weapons* of the so-called *real fighters* of the enemy.

Reflecting on the inevitable consequence of the constitution of sexuality as an object that enables both self-ownership of the sexual identity and its seizure or commodification by third parties, Davies (1994, 376, 382; 1999, 338–341) cogently articulates that the sexual relationship is no exception to possessive and proprietary relationships where self-construction is maintained through exclusion, repression,

[35] *Prosecutor v. Cesic*, 11 March 2004, International Criminal Tribunal for the Former Yugoslavia, IT-95-10/1-S, paras. 13, 14, 35.

[36] *Prosecutor v. Todorovic*, 31 July 2001, International Criminal Tribunal for the Former Yugoslavia, IT-95-9/1-S, paras. 39–40.

[37] *Prosecutor v. Krajisnik*, 27 September 2006, International Criminal Tribunal for the Former Yugoslavia, IT-00-39-T, para. 800.

[38] *Prosecutor v. Tadic*, 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, IT-94-1-T, para. 206.

and formulation of identity. When the sexual relationship is interpreted with notions of possession, there seems to be no significant difference between love and rape, where femininity is attributed to being appropriated, and masculinity corresponds to appropriation in both cases (Davies 1994, 372). Again, it is not the quality but the degree of the relationship that is in change with regard to male sexual violence when the perpetrator seizes the proprietor, or the otherwise possessive role of the male victims. The property, here, is signified through a masculine organ, the mutilation of which symbolizes the loss of manhood. Thus, the ICC's Kenya interpretation confirms the perpetuation of the phallic economy where all types of exchange take place between men (Irigaray 1985). The Court translates the Kenyan violence as a conflictual exchange between male combatants where the male sexual organ is one of the targeted and destroyed properties.

On account of the positive developments with regards to the ICC's initiative of achieving gender justice both at the administrative level as well as the prosecutions, what is overlooked is the fact that individual freedom and genuine equality are compromised and even frustrated by the Court's unintended complicity in the patriarchal discourse which is under continuous construction. When the security of individuals and groups is defined by security professionals and politicians in ethnic terms, as happened in former Yugoslavia and in Rwanda, different ethnic groups are perceived as *threatening identities* that pose a security dilemma for the society to be protected. The crux of the matter here is that these ethnic identities are taken as if they are fixed and monolithic structures whereas both the threatening *other* as well as the threatened *us* identities are mutually constructed and reified in a political process (Bilgic 2014, 265–266). Rather than providing "an official version of the past" (Wilson 2011) or "background information", international criminal courts and tribunals possess a tendency to transform grand narratives into clear-cut forensic evidence (Dojcinovic 2014). With regard to sexual violence crimes, this tendency shows itself in providing a subjective account of "what happened" through a patriarchal perspective as if the latter constitutes the only truth and reality.

One of the most important outcomes of the perpetuation of the masculine discourse in court rooms is the contribution to the reconstruction of inter-group conflict that has been founded not only on ethnic lines, but along with a rigid patriarchal understanding, albeit in a different domain, using a different—i.e. legal—discourse. For instance, Buss (2014, 77), looking closely at the practice of the ICTY in the Srebrenica case, argues that "[k]nowledge is not simply encountered in international criminal law: it is also produced." Other than this single ontological and epistemological approach, we cannot hear the voices of individual women or feminist groups such as Women in Black (WiB), who have been fighting against patriarchal discourses and practices before, during, and in the aftermath of the Srebrenica massacre (see Bilgic 2014). What we can hear and understand is a totalized "truth" for Srebrenica women, who are depicted collectively as members of a highly patriarchal community for whom survival, and successfully re-establishing their lives without men, became almost impossible.[39]

[39] *Prosecutor v. Krstic*, 2 August 2001, International Criminal Tribunal for the Former Yugoslavia, IT-98-33-T, para. 91.

Now, through the early examples of case law, the ICC seems to follow the same path trodden by the *ad hoc* tribunals by confirming the ongoing process of rival identity constructions between and within communities. Reinforcement of ethnic differences, and minimizing women's sexual and political agency through international prosecutions might be interpreted as "unintended consequences" (Engle 2005, 807) though such consequences unfortunately lead to the confinement of both male and female identities within closed, non-inclusive, and inflexible communities.

The judiciary dimension of transitional justice has the dangerous potential to contribute to the re-masculinization process of post-conflict societies (Cockburn and Zarkov 2002; Franke 2006, 824; Ni Aolain 2006, 830; 2009). As it stands, the international community's role in transitioning societies represents in its current form a perilous approach in its endorsement and even reproduction of, rather than confrontation against, traditional gendered discourses. In addition to the "intra-male" feature of negotiations in transitional justice processes (Ni Aolain and Rooney 2007), international prosecutions on sexual violence follow the pattern of inequality through acknowledging and (re)producing the intra-male character of the conflict. What is at stake is the contribution of the international community with its own patriarchal discourse that perpetuates inequalities and handicaps engrained in groups with different identities that establish the real causes of the conflict.

The ICC neither opposes nor criticizes the local patriarchal discourse, but replaces it with the international community's male-oriented discourse (Handrahan 2004) by depicting the conflict as intra-male and extracting the sexual trait of the violence imposed on men in Kenya. Thus, it is not only an incomplete narrative with regard to what had happened. The Court makes a choice amongst various narratives, erases the "sexual" and "gender" dimensions of acts of forcible circumcision and penile amputation, and carries a patriarchal discourse which is essentially oppressive for women into the post-conflict period. By doing so, the ICC does not actually and effectively take part in a "transitioning" process as it remains contestable what type of a transition is in process as long as transitional justice projects produce restricted accounts of violence and remedy (Nagy 2008).

Although the ICC gives the impression that it deviates from its predecessors when it disconnects sexual violence from ethnic prejudices and motivations in the situation of Kenya, there is apparently a pattern followed to the detriment of genuine gender equality. The ICC, in its particular interpretation of male sexual violence in the Kenya Decision of 23 January 2012, reinforces a masculine manifestation of sexual violence, excludes gendered violence directed towards males, and thus victimizes and subordinates women once more by confirming the intra-male character of the conflict. Humiliation and degradation are certainly an element in sexual violence crimes, yet the meaning attributed to humiliation differs according to the victim's gender. Men are humiliated when they are deprived of their male power to perform sexual intercourse either through penile amputation or being forced to perform sex acts without their *consent to act*. The type of consent is a different one for women, as women are still regarded as the passive actors who give consent to men, who are acknowledged as the active performers. The male victim is deprived of his active agency by losing his control of the male sexual organ to

which patriarchal societies commonly attribute manhood, or when he is forced to watch female members of his ethnic group being raped or sexually abused in other ways than rape. Thereby, the ICC, following the ICTY's contribution to "Balkan-patriarchy" (Hansen 2000) and the ICTR's similar approach of reconstructing patriarchal discourse in Hutu and Tutsi communities (Buss 2009), takes part in the reproduction of a world-wide patriarchy discourse.

The crucial problem in all violence cases, of which feminists should be vigilant, is the mutilation of female agency not only at the pre-conflict stage or in the course of the conflict, but also at the post-conflict stage where international criminal prosecutions (re)construct the patriarchal discourse. Rather than broadening the crime categories to cover all forms of sexual violence as well as introducing a novel definition to include violence targeting an individual's imputed, perceived, or actual sexuality (Lewis 2009), the main concern should be to realize that international prosecutions contribute to the transformation of *imputed* or *perceived* sexualities into *actual* ones. Not hearing male and female voices with their personal experiences, as well as not taking into account "gendered harms that men and boys face" (Grewal 2015, 161), erase different realities for the sake of one reality that speaks with a single and exclusionary male voice (Cornell 1993; Russell 2013).

However, "different contexts reveal different configurations of inequality" (McCall 2005, 1791). A meaningful remedy cannot be achieved unless the problem is identified not as a fixed male identity, but as any "dominant framework of discrimination" (Crenshaw 1989, 152). With a radical discursive contestation against the congealment of gender-biased binaries, it will become clear that the targeted group of victims does not necessarily have to be composed of only women let alone a particular group of women for there to be subjugation and subordination. Thus, following critiques of intersectionality theory's tendency to homogenize "black womanhood" (Nash 2008; Walcott 2005), feminist scholarship must begin to broaden its reach to hear different voices among all categories of women (Zack 2005, 7), and also go beyond womanhood to include intersectional identities like "straight white maleness" (Kwan 1996, 1275) or black maleness (Chang and Culp Jr. 2002, 489). Just as "sexual offences must be treated as separate and independent of the gender of the victim" (Grewal 2015, 161), gender violence must be treated as separate and independent of the sex of the victim. In order to free itself from biased violence narratives and contribute to their removal in favour of genuine justice projects, law should develop a more critical stance against the dominant patriarchal discourses sustained with a sufficiently flexible intersectionality perspective that attends to the myriad of subjectivities that are implicated in ongoing inequalities and injustices.

Conclusion: The ICC as a Congenitally Failing Operation

International prosecutions are not merely recounting the events of sexual violence; they are also defining the essential parts of gender roles, which lead to a different type of intervention in transitional societies through the translation of sufferings into a particularly dominant patriarchal legal language. With international prosecutions,

international criminal law enters into a dialogue with the patriarchal discourse. Yet, this is a biased dialogue in favour of the dominant patriarchal discourse, which almost always intersects with the ethnic character of the conflict albeit ruling out its subjugated alternatives.

The *prima facie* outcome of the limited view of the wrong is that "any violence, including sexual violence, that does not fit [the ethnic inter-group conflict] framework […] slips out of focus" (Buss 2008, 115). A more covert though no less detrimental outcome of this limited narrative is to support gender-biased categories or stereotypes while burying subjective experiences of both men and women, and eclipsing the multiple burdens they are subjected to. The image of the vulnerable female victim, which is at the forefront of such stereotypes, both produces and is produced by "the masculine bearer of 'civilization' who rescues 'native' women from 'barbarian' men" (Otto 2006, 320). Confirmed and consolidated by the legal system, the uttered binary of the masculine saviour and its feminine other furthers the already gendered binary of the female victim and the male perpetrator. The articulation of the crime and the criminal of sexual violence as such not only signifies a certain type of atrocity, but also justifies "the rehabilitation of the post-conflict state [that does] little, in effect, to address systemic violence and inequality" (Buss 2011, 422). Law, instead, should take part in developing and supporting transformative discourses by rendering visible feminist contestations both at the local and global levels.

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